

Library of Congress
Copyright Office

[Docket No. 98-12A]

Promotion of Distance Education Through Digital Technologies

Request for comments and notice of public hearing

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Request for presentation of Testimony at Third Public Hearing, February 12, 1999,
University of Illinois at Chicago, College of Medicine, Room 423, 1853 West Polk
Street, Chicago, Illinois,

Dear Attorney Advisor Rajapakse and to whom it may concern:

Please accept this document as my request to present testimony at the Third Public Hearing on February 12, 1999 in Chicago, Illinois. Specifically, my comments would focus upon the "Application of Copyright Law to Distance Education," the fourth agenda item as listed in the December 23, 1998, Request for Comments and Notice of Public Hearing, published in 63 FEDERAL REGISTER 71167. While practicing law for several years and holding both the J.D. and LL.M. degrees, I have of recent been a faculty member at the University of Wisconsin—Milwaukee, since obtaining my Ph.D. in Information Science from the University of Illinois at Champaign—Urbana in January, 1998. Since that time my research interests have included work in copyright law and policy within the broader area of information law and policy, and information ethics. The University of Wisconsin—Milwaukee has also established a Center for Information Policy Research, of which I am Co-Director. In addition to my research agenda, my work as a consultant to various educational institutions regarding the application of copyright law to their unique environments provides me with valuable insight into the needs of copyright users. (I am also one of those users, being personally involved in distance education as an instructor at our university). It is hoped that the expertise which I could offer in the area of copyright law and policy specifically as it applies to educational settings would contribute significantly to the information gathering the Copyright Office is undertaking through the public hearing process. A current curriculum vitae is attached for your review.

Respectfully submitted,

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Prepared Statement of
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Application of Copyright Law to Distance Education

I. Introduction and Background.

Since the very beginning, the rhetoric of the National Information Infrastructure (NII) included the concepts of commerce and education as essential and compatible elements of its grand design.ⁱ Providing safe and secure networks for e-commerce was the best way to encourage private investment in the NII.ⁱⁱ Education also played a key role in Clinton Administration philosophy in two ways. The NII would provide new opportunities for education and these increased educational opportunities would in turn spur-increased public interest in NII.ⁱⁱⁱ Thus the construction of the NII provides opportunity for both the preservation and growth of private and public sector interests.^{iv}

The first step was to prepare the way for private sector investment in the NII. In terms of intellectual property rights, this meant identifying areas in need of legislative reform.^v If as one commentator has argued, digital property will become the currency of the 21st century,^{vi} then copyright owners' as well as copyright users' rights must be preserved and articulated in digital environments. Without the preservation of users' rights copyright becomes a mechanism of control instead of access, making society less well off instead of better.^{vii}

While the incentive and reward component of our copyright law must be promoted it must not override its underlying rationale, that of societal benefit.^{viii} Recent legislation has preserved the incentive and reward component of our copyright law. For example, in passing The Sonny Bono Copyright Term Extension Act,^{ix} the House Committee on the Judiciary commented that "[e]xtending copyright protection will be an incentive for U.S. authors to continue using their creativity to produce works, and provide copyright owners generally with the incentive to restore older works and further disseminate them to the public."^x An amendment to 17 U.S.C. §108(h) provides a special exemption for libraries and archives meeting certain conditions and might be interpreted as preserving the societal benefit or access purpose of the copyright law.^{xi}

In fact, librarians and archivists and educators have long been singled out for their unique role in providing access to information within the schema of copyright law. According to the drafters of the White Paper, libraries have immunity from incidents of contributory infringement.^{xii} Likewise while discussing the Computer Software Rental Amendments of 1990^{xiii} the House Judiciary Committee reiterated the important role of these institutions in providing access to information and supported these institution's right to loan software: "Such institutions serve a valuable public purpose by making computer software available to students who would not otherwise have access to it. [footnote omitted] At the same time, the Committee is aware that the same economic factors that lead to unauthorized copying in a commercial context may lead library patrons to also engage in such conduct. Therefore, the bill requires that all copies of software lent by nonprofit libraries bear a notice warning to the borrowers that unauthorized copying may violate the copyright laws."^{xiv} A similar exemption and warning notice is contained in 17 U.S.C. §108 (1998) (library reproduction equipment, i.e., a photocopier).

Congress has demonstrated a consistent attitude towards the preservation of "fair" use rights and has been receptive to the need to adopt existing laws and concepts to new technologies and situations. A balance of rights is sought between copyright owners and

users. In fact, the drafters of the White Paper considered and rejected a blanket exception to the copyright laws for nonprofit institutions.^{xv} In a more recent example, Section 404 of the Digital Millennium Copyright Act^{xvi} contains a provision that now allows qualifying libraries and archives to make “three copies or phonorecords” of published works “if the existing format in which the work is stored has become obsolete.” This is a significant extension of the rights of nonprofit institutions under the copyright law. “This provision is intended to permit libraries and archives to ensure that copies of works in their collections continue to be accessible and useful to their patrons. In order to ensure that the provision does not inadvertently result in the suppression of ongoing commercial offerings of works in still-usable formats, the amendment explicitly provides that, for purposes of this subsection, a format will be considered obsolete only if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or reasonably available in a commercial marketplace.”^{xvii}

The foregoing review has established that Congress has attempted to preserve the incentive and reward component of our copyright laws as new technologies have developed. Congress has also seen fit to preserve the “fair” rights of libraries and archives in new technology environments as well. It is time to ensure that users in educational settings have the same opportunities to benefit from new forms of technology and information dissemination. Unless educational institutions are secure in their fair use of copyrighted material the development of distance and remote education programs will wither instead of grow; thus would a critical component of this Administration’s vision for the NII remain unfulfilled. It is for these reasons that the panel members gathered here today are urged to act, within the limits of their authority, to guarantee the rights of educational users to operate in distance or remote education environments. These rights should provide copyright users with at least the same freedoms as well as restrictions that now govern teachers and students in “live” classroom settings, and in light of the growing importance of distance technologies in education, consider an expansion of those rights.

II. The Law and Logic of Copyright in Distance or Remote Education Environments.

The history of distance education has seen three major paradigms shifts: correspondence course (one to one), remote broadcast (one to many) and now web-based instruction (many to one).^{xviii} While traditional correspondence schools still exist, at present there may be two distinct scenarios operating side by side when educational institutions develop modern distance education or remote instructional programs. A given institution may use both scenarios at the same time in different courses or even at different times in the same course. The first scenario is one in which instruction is somehow presented live and then either contemporaneously distributed via network technology (performed or displayed) and/or stored for later transmission. This scenario most closely resembles and impacts upon users’ rights as elucidated in 17 U.S.C. §110. It is the “classic” distance education protocol. Another scenario is rapidly gaining prominence and that is web-based instruction. Its use in higher education is extensive. In this scenario students are provided access to copyrighted material vis-à-vis postings on or links from a course web page. The page is designed by one or more of the following: the instructor, a

departmental resource personnel, or similar person at the institutional level. There may in addition be a “live” component to the web page itself, but that live component typically consists of chat or correspondence sessions and does not involve the performance or display of copyright material in the sense of a traditional broadcast scenario. However, the material loaded on or linked to the class web site does raise, at the least, copyright issues of reproduction and display, perhaps a distribution and a derivative work as well.

It is not here argued that the copyright owners’ rights of reproduction, display and performance do not apply to the Internet, online or web environments, or that owners’ rights should be ignored, indeed those rights do apply and their rights should not be ignored.^{xix} What is suggested here today is the consideration of mechanisms, guidelines or statutory amendments to allow for the fair use both in a strict legal sense and in a general sense of copyrighted material in the scenarios described above. For example, amendment of 17 U.S.C. §110 could allow for the extension of the performance and display right to distance or remote transmissions of live or stored instruction in both traditional broadcast or in web-based instructional settings.

Consider a typical distance education interaction. A class of twenty students. Half of whom are live, that is, present in front of the teacher during instruction. Five students are at other locations around the state and receive a remote transmission of the class. The remaining five students are out of the state or even reside in another country. The content of the live session is recorded and stored on an institutional web site for later viewing by those students. In the alternative, all twenty students might be remote and merely review copyrighted material at their leisure and own pace on the class’s web site, with no live session of copyrighted material whatsoever. The copyrighted material might include the use of portions of textbooks and articles, music, video and other images (photographs, slides, etc.); resources which under existing law and guidelines might properly be reproduced, performed or displayed in a live classroom setting. Should the distance or remote students be penalized from receiving what would otherwise be an allowable display or performance if they were live and in front of the teacher during that display or performance? Likewise should the twenty web-based students be prohibited from viewing material simply because the approach chosen to relay course content to them is through digital technology such as a web site instead of a traditional face-to-face educational environment? The ability of each student to reproduce copyrighted material from the course web page may represent a scenario that is less like a performance or a display than would be a similar performance or display to live students under 17 U.S.C. §110. However, if access is limited to viewing the material only, without the ability to copy, then that use is certainly something less than an outright purchase of a textbook or other instructional material by a student, i.e., where each student obtains a copy of the protected material for their own use. Does or should location or medium matter in copyright law? Should it matter in education? The application of copyright law to distance education unsettled.^{xx}

Congress has exhibited caution with respect to expanding distance or digital rights for educational institutions. For example, in Section 202 of the Digital Millennium Copyright Act,^{xxi}

Congress created a special institutional exception for nonprofit institutions of higher education when a faculty or graduate student is providing a teaching or research function. However, Congress specifically directed that the limitation of liability does not apply to the “provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student.” The Committee also indicated that the “provision of online access” exclusion would include material presented via e-mail.^{xxii} This general institutional exemption from liability and the online and e-mail exclusion from the exemption do not mean that the provision of such material by such mechanisms is or is not an infringement, simply that the institution can not claim a limitation on liability. It might suggest that Congress is tentative to release the institution from its responsibility to work within the copyright law and promote compliance by users in the provisions of its educational materials and instruction.

It appears that the existing copyright law, including the expression of that law in various so-called “fair use” guidelines operates to prejudice certain forms of instruction. As a result, certain categories of students receiving those formats are likewise treated differently merely because the law did not foresee the extent and range of technology that would be applied in educational settings. The copyright law and its applications prejudices some students and limits their access to otherwise available copyrighted material because of the medium or location of their instructional environment.^{xxiii} This appears to be in direct opposition to the technologically intensive environment that the designers and visionaries of the NII had in mind.

Several examples can demonstrate the inadequacy of the existing climate of laws and “fair use guidelines.” The use of electronic reserve is an integral component of many distance education courses. Students who reside off-campus may need to access a collection of course readings remotely. A student on campus can of course visit the library reserve desk and make his or her own copies if the student so desires. Students taking a web-based course may find a link from the course web page to the institution’s library electronic reserve or the readings may be accessed on the course web site. However, the existing guidelines suggest that “[t]he total amount of material included in electronic reserve systems for a specific course as a matter of fair use should be a small proportion of the total assigned reading for a particular course.”^{xxiv} This might service well a campus of students with convenient access to on-site reserve rooms but the reality of education in the NII environment is that some students may never make a single physical visit to the campus or library of the institution providing the instruction.

Likewise, the recent Fair Use Guidelines For Distance Learning allow for either live or recordation for later transmission. However, it is not at all clear that the loading (reproduction), of a variety of copyrighted material on a course web site would be considered a fair use in distance learning settings.^{xxv} The guidelines “do not cover asynchronous [less that actual real time, it may be faster or slower than a moment-to-moment transmission] delivery of distance learning over a computer network, even one that is secure and capable of limiting access to students enrolled in the course through PIN or other identification system.” Unfortunately, pass-worded access to course web

material or electronic reserve readings is emerging as the mechanism of choice in many institutions, yet this provision is not contemplated by the guidelines. Moreover, the guidelines indicate that “[a]lthough the participants believe fair use of copyrighted work applies in some aspects of such instruction, they did not develop fair use guidelines to cover these situations because the area is so unsettled. . . . Thus, consideration of whether fair use guidelines are needed for asynchronous computer network delivery of distance learning courses perhaps should be revisited in three to five years.” Technology and education have forded ahead and the time is overdue for revision of these guidelines. Finally, the guidelines state that “[r]eception must be in a classroom or other similar place devoted for instruction or any other site where the reception can be controlled by the eligible institution.” However, this does not allow for reception by web-based instruction or by remote students who may be accessing the virtual “classroom” from their own home through a personal computer. Yet, tele educating like telecommuting is something contemplated by the designers of the NII. The portion limitations also penalize those in distance setting. If a National Geographic video may be “performed” from semester to semester under 17 U.S.C. §110, why is a “[p]erformance of an entire copyrighted work or a large portion thereof [able to] be transmitted only once for a distance learning course”?

While the White Paper implies that browsing in web environments is a display for purposes of the Section 106 right (and would include for example, a student’s use of material viewed on the course web site), case law suggests a contrary result. Humans cannot perceive a digital image in its elemental form of sequential zeroes and ones. The representation of those zeroes and ones in a visual or sensory image is required. Therefore, browsing computers screens, or web pages for that matter, is the functional equivalent of reading.^{xxvi} Libraries do not pay twice (once for the initial acquisition, then a second fee for its actual use) when patrons read or otherwise access material in its collections. It should be no different in digital environments. Educational institutions should be allowed to present (display) materials in their collections for student use in distance or web environments.

So too would 17 U.S.C. §110(2) allow a teacher to show a video type to present (live) students if the requirements of section were otherwise met but the teacher could not show the video as freely in a distance environment, nor certainly, load the entire content onto the course web site for viewing by remote students. Why should the law treat students in one physical location (the traditional classroom or live site) different than students who by happenstance are in a virtual location (the virtual classroom or remote site).^{xxvii}

The recent guidelines for fair use of education multimedia, when and if applied to web-based instruction offer the same limitations.^{xxviii} These guidelines attempt to provide concrete limits on the amount of copyrighted material that may be incorporated into education multimedia under the fair use doctrine. (See, Multimedia Guidelines, Section 4: Limitations—Time, Portion, Copying and Distribution.) However, this direction is of little help when applied to distance settings. Conceivably every web course site designed by an instructor that incorporates some copyrighted text, image, sound, and motion media might be a educational multimedia work under the guidelines. Students’ posting to the

course web site (often a requirement for homework projects in web-based instruction) might similarly be so treated. If the portion limitations of the multimedia guidelines are simply applied to distance education settings, the guidelines would operate to severely restrict the packaging of materials into a single unified web display or performance that is at the heart of most web-based course content.

There should be some allowance for distance or web-based educational use of copyrighted material in these episodes. Likewise should there be assurances that in return for these allowances, educational institutions make some effort, at least as much effort as a library or educational institution would have in an print or analog world, to ensure that only an educational use was made of the material, that the opportunity for reproduction or other right of the copyright owner is protected by subsequent users (students) and that proper recognition (including compensation) is due to publishers and owners of the material when students obtain a copy of a work, the equivalent in essence of a purchase of the work. Educational institutions do not deserve a blanket exception to use copyrighted material, but by the same token, those institutions should not be penalized, and perhaps should be encouraged, when adapting existing concepts of learning to new environments. Truly then can we become in the words of the Information Infrastructure Task Force, a nation of “life-long learners.”

In summary, the rights of reproduction, performance, display and potentially the right to make a derivative work are implicated in distance education settings. With a traditional broadcast scenario, the reproduction right comes into play when the remote or receiving site makes a copy of the class session that may include previously acquired copyrighted material, such as an overhead transparency or slide or video. The distance education guidelines discussed above provide for the ability of the remote-receiving site to make and retain a copy of the broadcast or transmission for a limited time.

More significant is the performance or display right that is implicated when the broadcast is made to the remote class site. The existing guidelines and statute do not make clear that all types of copyrighted material that educators might otherwise need to use in a “live” class for instructional support and enhancement can likewise be used in a distance setting. In addition, the guidelines are also problematic for educators who desire to use a variety of formats in the presentation of web-based instruction (though it is arguable that the guidelines place no such limit on use of various formats, i.e., video, sound, print, etc.). Likewise problematic is that fact that not all types of “broadcast” mediums covered (“[t]hese guidelines do not cover asynchronous delivery”). The law should be amended to allow for these uses or guidelines developed to accommodate these scenarios.

In the context of the web-based instruction the reproduction right is implicated. The entire course content, including previously copyrighted material, as opposed to the material created by the instructor. A variety of formats are “packaged” into a single virtual or digital location, the web site. This creates a “course in a box” approach if you will to education. In addition, the class web site is often created in conjunction with an electronic reserve component maintained by the institution’s library (to facilitate this a

link is placed on the class web site that directs students to the institution's library web site where the electronic reserve is accessed). First, there should be no difference under the law between an electronic reserve created and maintained by an institution's library and one created by convenience by faculty in web-based instruction (assuming legitimate copies are used). Second, there should be no difference between print and digital formats in reserve construction. The electronic reserve guidelines should allow for the placement of an entire course's reading onto an electronic reserve in an e-reserve setting in the library or on a class web site. The recognition of digital copying in libraries and archives is supported by recent changes to 17 U.S.C. §108.

The copyright law should accommodate the reality of digital technology use in education. While there is opportunity for students to duplicate entire course readings from an electronic reserve or entire course content from a class web site, the library or parent educational institution should not be viewed in the position of a contributory infringer simply because it provides copyrighted materials to remote students through a "virtual library" on a web site using technology that also allows students to copy that material.^{xxix} In traditional library and education settings Sections 107 and 108 and the guidelines promulgated thereunder allow for institutional and classroom (student) copies to be made with out fear of either direct or contributory infringement, if certain conditions are met. At the least these requirements and portion limitations should apply to digital copies made in conjunction with the provision of distance instruction. Moreover, the law allows for additional copies to be made by a library if those copies facilitate the delivery of that material to the patron. Consider the filling of an interlibrary loan request. Additional copies may be required to deliver the work to the patron (interlibrary loan by facsimile (fax) or electronic request and delivery).^{xxx} A digital copy of a print article in the library's collection is made (first copy), next the article is loaded onto the library's computer system for delivery via e-mail to the patron (second copy), and sent to the patron who may print out the article (third copy). This assumes of course that precautions are taken consistent with existing law.

The ability of subsequent users (students) to reproduce or display or distribute copyrighted material does not serve as a bar to an entity's initial presentation of the material in a traditional classroom and it should not be a concern in a distance or web environment. Where concern does exist, other mechanisms discussed below may be employed to insure that students do not reproduce, distribute or display the work beyond the limits of fair use. For example, the limited audience requirement for the performance right under Section 110 and the distance guidelines (registered members in the course through the use of password access or other secure network) or the patron notice and education provision under revised Section 108 (use of copyright warning notice) might be adapted for use in distance education settings.

Finally, the placement of related copyrighted material together in a course web page might also be viewed as the creation of a derivative work, especially if digitalization (resulting in a change in format or medium) has occurred in order to place the material on a class web site.^{xxxi} Recent change to 17 U.S.C. §108 gave libraries and archives the ability to digitize materials in their collections and this could be interpreted to include

reproduction of copyrighted material in support of a distance course. Educational institutions in distance environments should have a similar right to that of a library or archive.

Creating an electronic reserve or posting material to a course web page might be interpreted as the creation of a course anthology. However, most electronic reserves still require the student to retrieve articles or other material individually and so remove it from the classic pre-made or compiled copy-shop scenario.^{xxxii} (So too, the fact that access and reproduction could be made simultaneously by every student in the class is a bit of red herring. What does it matter that a student can do it at the same time as another student or wait their turn in line (to compile their own personal anthology). Furthermore, recent precedent suggests that a “copy” of a print compilation is not made by merely allowing a user to recreate the printed order of the compilation from a digital version of that compilation when that digital version does not itself reproduce or recreate the print compilation in the same exact (ad seriatim) order.^{xxxiii} This suggests that construction of most electronic reserve and web-based reading lists and the subsequent printing and compilation by students are not the equivalent of a course packet or anthology. Therefore, if the articles or other materials reproduced would otherwise qualify as a fair use, the creation of an electronic reserve or web-based reading list with those articles should also be a fair use.

IV. Proposals

As discussed above, there are numerous unsettled questions in the application of copyright law to distance education. Therefore, the following restrictions are suggested for incorporation into either new or existing guidelines or proposed statutory amendment that would minimize the disparate treatment of distance or remote students with respect to their access and use of copyrighted material in instructional settings. The following suggestions are made to ensure the rights of copyright owners in education settings.

First, there should be a limitation on the audience permitted to benefit from the reproduction, performance or display of the copyrighted work. This should be limited to enrolled members of the class. In web-based settings (electronic reserve and instruction) this would entail the use of a password mechanism to guarantee that only legitimate users have access to the copyrighted material.

Institutions should also be required to post similarly designed warning notices and engage in copyright education compliance programs. This is consistent with the spirit of copyright warning notice provisions of Sections 108 and 109, and the new copyright information dissemination requirement of the higher education institutional liability limitation provision of new 17 U.S.C. §512(e)(1)(C). In addition to warning notices on web-based instructional materials this might include the requirement of student acknowledgment of risk and responsibility for their subsequent misuse of copyrighted material. A warning and acknowledgement could also be part of license mechanisms that attempt to assess a fee, based upon a per use or classroom “seat license.”^{xxxiv}

Assuming that the actual licensing of a variety of materials in a variety of formats could be easily accommodated vis-à-vis some sort of blanket or compulsory license scheme, a problem with a per student or seat fee remains. Such “compulsory-like” licensing fails to delineate a fair-use from an every-use (license) from an outright purchase of the material. Students should not have to pay for the mere use of an item in the same way that patrons or students are not charged for the right to use or view an item in the library. Furthermore, fair use would allow some reproduction, display, performance, etc., of copyrighted works. The concept of fair use must be preserved to address the reality that some use of copyrighted material would always be allowed, either by adjustments in price or the preliminary establishment of portion limitation guidelines to distance environments.

Any such uses under these mechanisms would of course be limited to non-commercial settings. As suggested earlier, not only might a web-based course be considered a multimedia work, it might also be viewed as a derivative work or compilation, similar to a digital equivalent of a subject anthology or reader, and could itself be a very viable commercial commodity. Perhaps publishers may see the actual advantage in letting, subject to the types of safeguards suggested herein, and so encourage educators to compile and create new works (multi-material distance or web course content) that those publishers might then market to other institutions outright. Obviously once use beyond the initial class/course compilation is contemplated, commercial exploitation is implicated and publishers would have a right to benefit from that further use.

Initially one safeguard would be to encourage the use of copyright management information (CMI) technology by institutions in, for example, web environments. Using CMI technology would, for example, allow students to view video tapes that had been made part of the web course vis-à-vis the Section 110 performance and display. (This assumes that law is changed to allow for that use and that a reproduction of that tape had also been accounted for under Section 108 or other reproduction provision). CMI technology would not, however, allow students to make a copy of that video or other material for that matter that had been loaded onto the site, unless the student had paid a seat fee that allowed for the purchase (reproduction) of the material.

Commentators cannot agree whether or not balance exists, and therefore, whether legislation or other changes contemplated here today would restore that balance or skew it. Consider the recent debate in the last Congress concerning H.R. 3048, the Digital Era Copyright Enhancement Act.^{xxxv} This is not the time to rekindle old legislation or critique that bill but it should be observed that while H.R. 3048 would have eliminated any difference between live and distance settings for purposes of performance or display under Section 110 and it may also have applied those principles to web-based instruction though not to the initial reproduction needed for that display or performance, it did not give proper recognition of the role of educational institution in preventing improper use of the copyrighted work beyond the initial classroom use. H.R. 3048 did not require expansion of the warning notice or copyright education program requirement.

H.R. 3048 would also have made clear that a contract or non-negotiable license is not a replacement for the delicate and balanced application of copyright law in digital environments.

The precedent established in ProCD, Inc. v. Zeidenberg^{xxxvi} and the potential of the Uniform Commercial Code article 2b revisions as well as other developments suggest that all uses of copyrighted material in information products and services might one day be governed by contract law.^{xxxvii} If this occurs, the concept of fair will cease to exist in the digital environment and the balance would surely have swung too far away from the public interest

The question is ultimately one of balance. The copyright law is asked to arbitrate in society the need to reward and encourage new knowledge creation and dissemination and the reality that the knowledge so created is hollow if it can not be accessed and used by the public at large. Our library and educational system is for better or for worse a dominant and for many the only mode of that information transfer. Therefore it has been given special treatment under the copyright law. This treatment should be preserved and extended fully into the NII environment. Obviously publishers and owners might not want any use of material to go uncompensated, likewise educational entities in their perfect world might want a blanket exception for all uses deemed related to “education” but neither owners nor users live in that world. It is difficult task of Congress to assess in part where the strike should be made somewhere in the middle of these two opposites.

Application of Copyright Law to Distance Education

Right of Copyright Owner Distribution	Reproduction	Performance	Display
Distance or Remote Site			
teacher » » » student Transmission	Use of	Performance	Display of
or at of copyrighted	legitimate	of copyrighted	copyrighted
institution remote site material	copy in class	material	material
Example	Overhead	Use of	Digital image
Material sent	transparency of	video	incorporated to
students	map or chart	under	into a
for class	or article from	§110(2)	PowerPoint
preparation	journal or magazine	lecture/ demonstration	
Web-based			
student » » » » access	Reproduction	Use of video?	Display of
Material sent			
at home or via network	into digital		digital copy
to students			
remote site access	format (on web		(on web site
for class	site or e-reserve)		or e-reserve)
to institution			
preparation			

Appendix

Answer questions in 4(a-d) 63 FR 71168

(a) Is existing law adequate in addressing current and anticipated forms of distance education using digital technology?

It is not adequate, nor is it clear that in the absence of additional guidance from Congress, the U.S. Copyright Office or “consortium group” guidelines how the law should be applied in distance education environments.

If not, in what ways is it inadequate?

As designed, existing law gave exceptional technology limited rights and common technology extensive rights, the reality in 1999 is that digital and distance technology is rapidly becoming the norm, it should have equal or greater rights.

Are there reasons why digital transmissions should be treated differently from education through broadcasting or closed circuit technologies, or in a traditional classroom?

With proper safeguards it should not be treated differently.

(b) Is it preferable to deal with the copyright issues raised by digital distance education through specific exemptions like section 110(2) or through flexible balancing approach like fair use?

The lack of clarity in spite of the extent of use suggest that a guideline approach may be too slow and thus unresponsive in developing; in fact, the development of so many

(classroom, off-air taping, music, etc.) guidelines in conjunction with the 1976 Act demonstrates problems of relying purely statutory fair use concepts.

What role should be played by voluntary guidelines such as the Fair Use Guidelines for Educational Multimedia (sometimes referred to as the Consortium of College and University Media Centers (CCUMC) guidelines)?

Guidelines can be useful in developing portion limitations that implement general concepts, however, there is no general concept in the statute for distance education other than those from the 1976 Act that refer to broadcast and transmission (“old”) technologies.

(c) If a New or amended exemption or exemptions for distance education were to be adopted:

Which section 106 rights should or should not be covered?

The right of reproduction, performance and display, potentially the right to make a derivative work if it is for non-commercial purposes.

What categories of works should or should not be covered?

All categories of works that could potentially be used by a distance educator.

To what extent should there be quantitative limitation on the portions of a work that can be used?

If applied, such limits should be no less than currently apply under statute or guideline for other works.

Who should be entitled to the benefits of such an exemption? Accredited or nonprofit institutions only?

The exemption should benefit only accredited or nonprofit institutions.

How should the class of eligible recipients be defined?

Eligible students should be only those registered for the course for which the distance material exemptions is sought.

Should such an exemption be limited to nonprofit distance education activities?

Commercial exploitation of the distance activity should not be protected, even if the original or initial purpose was non-commercial.

Should the use of technological measures to protect against unauthorized access to, and use or retention of copyrighted materials be required? If so, what types of measures?

Access to and use or retention should be limited to students registered for a specific course. The use of passwords and other student warnings and acknowledgements should be employed. Technological measures designed to prohibit reproduction of the work (download and print) might also be considered.

To what extent should the availability of licenses for the use of copyrighted works be considered in assessing eligibility?

Licenses should not replace concepts of fair use in copyright. If available, the use of licenses should be sought, and may even be required, subject to the previous concern, i.e., the license must allow for some fair use.

Should there be limitation on student copying or retention of the copyrighted material?

Unless students or the institution has in some measure compensated the copyright holder for the purchase of a copy, the retention of copyrighted material should be prohibited. However, any requirement of a user or seat license, must preserve fair use concepts, as well as provide students with the opportunity to access, use, and perhaps even reproduce the copyrighted material for a limited term. Students and institutions should not be required to pay for the mere access and use of copyrighted material if that student or institution otherwise has a previously obtained a legitimate copy through purchase or lease, if certain conditions are met (password, warning notice, student acknowledgements, CMI technology). Otherwise, this results in a situation where a student or institution is paying twice for a copyrighted work simply because of the form it must appear in for some students to utilize it.

Should the provision of electronic reserves be included?

A provision for electronic reserves should be included electronic reserves have become an essential element in information access for both distance (remote) and web based learners

Should the provision of any information about copyright law be required as a condition for eligibility?

Eligible institutions should, as a condition of exemption, be required to take measures to protect copyright owner's interests such as the use of password access to copyrighted material, warning notice and compliance programs, the use of CMI technology, etc.

Are there other factors that should be taken into account?

Licensing cannot replace fair use. The original purpose of copyright law is to benefit the public.

(d) What would be the economic impact of such an exemption, including the impact on the actual or potential markets of copyright owners of different types of works?

If precautions (qualifying requirements) are instituted copyright owners would be compensated no less than under present law, and would probably be compensated more so. Further the suggestions/opinions above may even stimulate partnership between the initial creators and organizers of course content (the educational institution and its faculty) and publishers. Finally, it would prevent educational copyright users from having to pay twice for access to copyrighted material (assuming initial purchase or license is made), or to pay simply for the right to read (see note xxxi, *infra*).

ⁱ Information Infrastructure Task Force, THE NATIONAL INFORMATION INFRASTRUCTURE: AGENDA FOR ACTION (1993).

ⁱⁱ (Andrew Grosso, The National Information Infrastructure: Implications of the Information Superhighway for Commerce, Security, and Law Enforcement, 41 FEDERAL BAR NEWS & JOURNAL 481 (1994); see also, David Johnston et al., CYBER LAW: WHAT YOU NEED TO KNOW ABOUT DOING BUSINESS ONLINE (1997) (Chapter 3: Business in Transition, 35-65).

ⁱⁱⁱ Thomas Kalil, Public Policy and the National Information Infrastructure, BUSINESS ECONOMICS, October, 1995, at 15.

^{iv} United States Advisory Council on the National Information Infrastructure, A NATION OF OPPORTUNITY: REALIZING THE PROMISE OF THE INFORMATION SUPERHIGHWAY (1996).

^v Information Infrastructure Task Force on Intellectual Property Rights, INTELLECTUAL PROPERTY RIGHTS AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter White Paper].

^{vi} Lesley Ellen Harris, DIGITAL PROPERTY: CURRENCY OF THE 21st CENTURY (1998); and George B. Delta and Jeffrey H. Matsuura, LAW OF THE INTERNET §5.10, 5-106 to 5-111 (1999) (Intellectual Property as a Resource and as a New Economic and Legal Paradigm).

^{vii} Ronald V. Bettig, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY (1996).

^{viii} See, Tomas A. Lipinski and Johannes J. Britz, Intellectual Property in the 21st Century: A Return to the Underlying Ethics of Information Ownership and Dissemination, ETHICS AND JUSTICE, January, 1999 (available at <http://www.ethics-justice.org/v2n1>) and the sources cited therein; and Tomas A. Lipinski and Johannes J. Britz, The Ownership of Intellectual Property in the 21st Century—from Access to Control: Ethical Implications, paper presented at Computer Ethics: Philosophical Enquiry [sic] (CEPE'98), London School of Economics and Political Science, London, United Kingdom, (In Association with the ACM SIG on Computers and Society), December 14-15, 1998 and the sources cited therein.

^{ix} Public Law 105-298, 112 Stat. 2877 (1998).

^x House Report 105-452, Copyright Term Extension, 105th Congress, 2nd Session, at 6 (LEXIS-NEXIS pagination) (1998).

^{xi} See, The Sonny Bono Copyright Term Extension Act, Public Law 105-298, 112 Stat. 2877 (1998) (section 104).

^{xii} See, White Paper, supra note v, at p 111, n. 357.

^{xiii} Public Law 101-650, 104 Stat. 5089 (1990) (Title VII).

^{xiv} House report 101-735, Copyright Amendments Act of 1990, 101st Congress, 2nd Session, 8 (1990).

^{xv} See, White Paper, supra note v, at 226.

^{xvi} Public law 105-304, 112 Stat. 2860 (1998).

^{xvii} Senate Report 105-190, The Digital Millennium Copyright Act of 1998, 105th Congress, 2nd Session (1998) (available at <http://thomas.loc/>) (page 3 of 4).

^{xviii} Michael Moore, Introduction: Background and Overview of Contemporary American Distance Education, in CONTEMPORARY ISSUES IN AMERICAN DISTANCE EDUCATION, xvii (Michael Moore, ed. 1990).

^{xix} See, F. Lawrence Street, LAW OF THE INTERNET (1998) (and the cases discussed therein); Kent D. Stuckey, INTERNET AND ONLINE LAW (1998) (and the cases discussed therein); Jonathan Rosenor, CYBERLAW: THE LAW OF THE INTERNET (1997); and Raymond T. Nimmer, INFORMATION LAW (1996 and updates) (and the cases discussed therein). See, e.g., Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (placing copyrighted images on a computer bulletin board is a distribution and a display); and Marobie-FL, Inc. National Association of Fire Equipment Distributors and Northwest Nexus, 983 F. Supp. 1167 (N.D. Ill. 1997) (placing copyrighted images on a web site is a display and a distribution).

^{xx} See, Arlene Bielefield and Lawrence Cheeseman, TECHNOLOGY AND COPYRIGHT LAW: A GUIDEBOOK FOR THE LIBRARY, RESEARCH, AND TEACHING PROFESSIONS (1997).

^{xxi} Digital Millennium Copyright Act Public law 105-304, 112 Stat. 2860 (1998) (creating 17 U.S.C. §512(e)).

^{xxii} Senate Report 105-190, The Digital Millennium Copyright Act of 1998, 105th Congress, 2nd Session (1998) (available at <http://thomas.loc/>) (page 3 of 4).

^{xxiii} See, Laura N. Gasaway, *Universities, Libraries and Fair Use in the Digital Age*, 69, 76-77, in *CURRENT LEGAL ISSUES IN PUBLISHING* (A. Bruce Strauch, editor, 1996).

^{xxiv} Fair Use Guidelines for Electronic Reserve Systems (Revised March 5, 1996) 195, reprinted in Bielefield and Cheeseman, *supra* note xix, at 195-199.

^{xxv} Educational Fair Use Guidelines For Distance Learning (Revised Draft, Phase I, October 30, 1996) 137, reprinted in Bielefield and Cheeseman, *supra* note xix, at 139-144.

^{xxvi} See, Stuckey, *supra* note xix, at §6.09[3] at 6-53 - 6-55, discussing, *Religious Technology Center v. Netcom On-Line Communications Services, Inc.* 907 F. Supp. 1361 (N.D. Cal. 1995).

^{xxvii} See, Gasaway, *supra* note xxii, at 76-77. Compare, Senate Report 105-190, *The Digital Millennium Copyright Act of 1998*, 105th Congress, 2nd Session (1998) (available at <http://thomas.loc/>) (page 4 of 4) (“Although online interactive digital networks have since given birth to online digital ‘libraries’ and ‘archives’ that exist only in the virtual (rather than physical) sense on websites bulletin boards and homepages across the Internet, it is not the Committee’s intent that section 108 as revised apply to such collections of information. The ease with which such sites are established online literally allows anyone to create his or her own digital ‘library’ or ‘archives.’ The extension of the application of section 108 to all such sites would be tantamount to creating an exception to the exclusive rights of copyright holders that would permit any person who has an online webstie, bulletin board or a homepage to freely reproduce and distribute copyrighted works. Such an exemption would swallow the general rule and severely impair the copyright owners’ right and ability to commercially exploit their copyrighted work.”).

^{xxviii} Fair Use Guidelines for Educational Multimedia(July 17, 1996), reprinted in Bielefield and Cheeseman, *supra* note xix, at 92-102.

^{xxix} But see, *Marobie-FL*, *supra* note xix (“In sum, Northwest [the online service provider] may not be held liable for infringement on theories of direct infringement or vicarious liability.” 983 F. Supp. at 1179. The contributory infringement claim is dependent upon the defendant’s knowledge and ability to monitor and control web site content, 983 F. Supp. at 1178-1179. The court commented: “Although plaintiff correctly points out that Northwest provided a service somewhat broader than the service provided by the Internet access provider in *Religious Technology Center*, the court nevertheless finds that Northwest only provided the means to copy, distribute or display plaintiff’s works, much like the owner of a public copying machine used by a third party to copy protected material. Like a copying machine owner, Northwest did not actually engage in any of these activities itself. Accordingly, Northwest may not be held liable for direct infringement.” 983 F. Supp. at 1178. Under this analysis, an educational institution that placed copyrighted material on a course web site would be liable under a direct infringement theory when it created the web site and contributory as well when it provided the means for students to do the same. The institution is less like the passive conduit of a Internet access provider or the traditional entity that places a photocopier in its library for patrons to use but otherwise does not reproduce, display or distribute copyrighted material.

^{xxx} See changes to 17 U.S.C. §108, allowing for “three copies or phonorecords” made by Digital Millennium Copyright Act, Public Law 105-304, 112 Stat. 2860, 105th Congress, 2nd Session (Section 404); and David Ensign, *Copyright Consideration for Telefacsimile Transmission of Documents in Interlibrary Loan Transactions*, 81 *LAW LIBRARY JOURNAL* 805 (1989) (same conclusion reached without 1998 amendment). See also, James S. Heller, *The Impact of Recent Litigation on Interlibrary Loan and Document Delivery*, 88 *LAW LIBRARY JOURNAL* 158 (1996); and David Ensign, *Copyright and the Use of Telefacsimile Among Branch Library Facilities*, 83 *LAW LIBRARY JOURNAL* 451 (1991).

^{xxxi} See, Walter A. Effross, *Withdrawal of the Reference: Rights, Rules, and Remedies for Unwelcomed Web-Linking*, 49 *SOUTH CAROLINA LAW REVIEW* 651, 677-681 (1998) (Section IIIB: Infringement by Unauthorized Creation of Derivative Works and the Fair Use Defense, and cases cited therein).

^{xxxii} See, *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996); and *Basic Books, Inc. v. Kinko’s Graphics Corporation*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

^{xxxiii} See, *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 674 (2nd Cir. 1998) (“There is no evidence that Bender and Hyperlaw’s case-retrieval systems [the digital version of the compilation] allow a user to browse the cases in the West arrangement [the print compilation] without first taking steps to create that arrangement [downloading or printing every reading from an electronic or web reserve].”).

^{xxxiv} See, Anne C. Keays and Andrew J. Warren, *Is Distance-Learning Bill Balances?*, *THE NATIONAL LAW JOURNAL*, October 26, 1998, at B5; and Street, *supra* note xix, at §5-1(I)(2), pp. 397-398.

^{xxxv} 105th Congress, 1st Session (1997). Compare characterization of H.R. 3048 by Julius J. Marke, Proposed Legislation on Digital Copyright, *NEW YORK LAW JOURNAL*, May 19, 1998, at 5; to Keays and Warren, *supra* note xxxix.

^{xxxvi} 86 F.3d 1447 (7th Cir. 1996), *rev'd* 908 F.Supp. 640 (W.D. Wisc. 1996).

^{xxxvii} N. Elkin-Noren, "Copyright Policy and the Limits of Freedom of Contract (Symposium: Digital Content: New Products and New Business Models)," 12 *BERKELEY TECHNOLOGY LAW JOURNAL* 93-113 (1997); D. A. Rice, "Digital Information and Property and Product: U.C.C. Article 2b" (Symposium: Copyright Owners' Rights and Users' Privileges on the Internet), 22 *UNIVERSITY OF DAYTON LAW REVIEW* 621-648 (1997); J. N. Talbot, "Facts, Copyright, Unfair Competition and Contracts; Will NBA v. Motorola Lead to Shrink Wrap Television?" 12 *THE ENTERTAINMENT AND SPORTS LAWYER* 7-12 (1997); Michael J. Madison, Legal-Ware: Contract and Copyright in the Digital Age, 69 *FORDHAM LAW REVIEW* (1999, forthcoming) (leading to shrink-wrap books and magazines); and C. R. McManis, "Do Not Support `Privatizing'" Copyright, *THE NATIONAL LAW JOURNAL*, October 13, 1997, at A24 (leading to shrink-wrap books and magazines).